SUPREME COURT, U. S.
FILED
OCT 18 1973
CLERK

No. 73-260

In the Supreme Court of the United States

OCTOBER TERM, 1973

CHARLEY JULIUS ANDREWS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that in the circumstances of this case the trial court's failure to instruct on the issue of entrapment constituted reversible error. As the following discussion demonstrates, this contention is groundless.

After a jury trial in the United States District Court for the Western District of Louisiana, petitioner was convicted on three counts of possession and distribution of narcotics in violation of 21 U.S.C. 841(a)(1) and 844(a). He was sentenced to ten years' imprisonment on Count I, one year on Count II, and five years on Count III, the sentences to run concurrently. The sentences were imposed subject to the parole eligibility provisions of 18 U.S.C. 4208(a). Pursuant to 21 U.S.C. 841(b)(1)(A) a special parole term of six

years was also imposed. The court of appeals affirmed *per curiam* (Pet. App. A). A petition for rehearing was denied on July 6, 1973 (Pet. App. B). The petition for a writ of certiorari was not filed until August 7, 1973, and is therefore untimely under Rule 22(2) of the Rules of this Court. There is in any event no occasion to grant the writ.

On May 15, 1971, at about 10:30 a.m., Special Agent Gordon J. Rayner entered petitioner's office in Eunice, Louisiana (Tr. 30)[1] and advised petitioner that he had been engaged in illicit drug traffic in New Orleans, and had buyers for any narcotics he could obtain (Tr. 31-32). Petitioner discussed with Rayner the market prices of heroin (Tr. 32-33). Petitioner told Rayner that he could obtain heroin from Mexico and deliver it to him at a price of $1,000 per ounce (Tr. 33).

Rayner further testified that petitioner said that he desired to expand his market into the New Orleans area (Tr. 64). Rayner told petitioner that he had a ready market for heroin in the New Orleans area (Tr. 32), and asked petitioner if he had a sample of the quality of heroin that he desired to sell (Tr. 34). Petitioner offered to sell Rayner a 1/8 ounce sample for $500 (Tr. 34). After further discussion petitioner agreed to sell the sample for $400 (Tr. 34-35). Petitioner then suggested to Rayner that they both drive to a specified location so that petitioner could transfer the heroin sample to Rayner (Tr. 34-35). Petitioner subsequently drove Rayner to that location, and the heroin was transferred (Tr. 35-36, 261-262).

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[1]"Tr." designates the transcript, the original of which is being lodged with the Clerk of this Court.

On May 26, 1971, petitioner delivered to Rayner 20 biphetamine capsules as a sample of drugs he was capable of selling (Tr. 83-85). At that time, Rayner also made arrangements for the delivery of five ounces of heroin; delivery was scheduled for the week of June 7, 1971 (Tr. 84-85).

On June 3, 5, and 7, 1971, Rayner spoke to petitioner (Tr. 86). The conversations were recorded and the tapes were played to the jury (Tr. 90; Exhibit G-3). During those conversations petitioner made arrangements to deliver to Rayner 10,000 biphetamine capsules in McAllen, Texas, on June 8, 1971. At the time the capsules were delivered, petitioner was arrested.

That same day, pursuant to a previously obtained search warrant, petitioner's office in Eunice, Louisiana, was searched (Tr. 180-181, 197-198, 237-238). Found in his office were 950 dexedrine tablets, 90 amphetamine-barbiturate capsules, 480 biphetamine capsules, and 650 benzedrine tablets (Tr. 181, 199-205, 262-266).[2]

Petitioner contends that the trial court indicated that it would charge the jury on the issue of entrapment, and that after petitioner conducted his entire case based on that representation, it was reversible error for the court to refuse to so charge. This contention is refuted by the facts.

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[2]Petitioner's trial in the United States District Court for the Western District of Louisiana concerned only his May 15, 1971, sale of the sample of heroin, and the drugs found in petitioner's office on June 8, 1971. The delivery of 10,000 biphetamine capsules in McAllen, Texas, was handled in the Southern District of Texas.

After the government's case was completed, petitioner's counsel inquired of the trial judge whether he would charge the jury on the issue of entrapment. The judge replied, "Yes, sir, I think I will charge on entrapment" (Tr. 281). Without calling any witnesses, the defense then rested its case (Tr. 283).

The following day, counsel for both the government and petitioner attended a conference in the trial judge's chambers prior to the closing arguments and the charge to the jury (Tr. 285 *et seq.*). At that time the government objected to the judge's proposed entrapment charge (Tr. 285). The judge stated that research done since his statement of the previous day that he would probably charge on entrapment, indicated that an entrapment charge need not be presented to the jury if the evidence did not sufficiently raise the issue, citing this Court's opinion in *Lopez* v. *United States,* 373 U.S. 427, 434-437 (Tr. 285-288). He then stated that there was nothing in the facts of petitioner's case to require such an instruction (Tr. 288, 306-307, 312-313, 317-318). The judge further stated that if he determined not to give an instruction on entrapment, he would probably allow petitioner to reopen his case if he was so requested (Tr. 289).

Although petitioner's counsel stated to the judge that he had based his entire case on the assumption that an entrapment charge would be given (Tr. 319-320), the fact of the matter is that the judge had never given petitioner any assurance concerning the entrapmet charge; the single statement he made is the one at the close of the government's case heretofore referred to (Tr. 281; see also Tr. 319).[3] At no time did petitioner

[3]Petitioner's counsel did assert that he had the impression that an entrapment charge would be given even prior to the conference (Tr. 320-321). However, he pointed to no reference in the transcript—and there is none—that would support this claim. The judge did state that while he did discuss entrapment prior to that time, he did not state that he would charge on entrapment (Tr. 322-323).

attempt to reopen his case. In light of these facts, the trial court's refusal to instruct on entrapment was not in error. There was no impropriety in the government's agent providing petitioner with the opportunity to commit a crime which he was clearly disposed to commit and which in fact he enlarged by his own free will, *United States* v. *Russell*, 411 U.S. 432. See *United States* v. *Aloisio*, 440 F. 2d 705, 711 (C.A. 7), certiorari denied, 404 U.S. 824, and *Bartoli* v. *United States*, 404 U.S. 824; *United States* v. *Russo*, 442 F. 2d 498, 503-504 (C.A. 2), certiorari denied, 404 U.S. 1023, rehearing denied, 405 U.S. 949.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.